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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DENMAN RUBBER MANUFACTURING COMPANY
AND CENTRAL NATIONAL INSURANCE
COMPANY OF OMAHA,
PETITIONERS

VS

VERDA D. HALL,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW [1] [2]

1. Whether the United States Court of Appeals for the Fifth Circuit erred in reversing the District Court's grant of summary judgment by allowing an expert's inadmissible and factually unsupported deposition testimony of a possible

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[1] All parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

[2] Corporate parties' affiliation: Denman Rubber Manufacturing Company has no subsidiaries or affiliates. However, the parent company of Denman Rubber Manufacturing Company is Jepson Corporation, which was recently purchased by the Great American Investment Company. Apart from its several wholly-owned subsidiaries, Central National Insurance Company of Omaha has no subsidiaries or affiliates. However, Central National Insurance Company of Omaha is wholly owned by Drum Financial Corporation, which itself is wholly owned by Professional Underwriters Investment Company.

manufacturing defect to defeat a properly supported motion for summary judgment.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in reversing the District Court's grant of summary judgment by not holding that plaintiff had failed to come forward with sufficient proof of an essential element of his case under state law, i.e., that the tire at issue was in normal use at the time of the accident.

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IN THE SUPREME COURT OF THE UNITED STATES

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DENMAN RUBBER MANUFACTURING COMPANY
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VS

VERDA D. HALL,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A writ of certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed a summary judgment granted by the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals reversing the District Court's summary judgment in favor of petitioners (Appendix A) was not reported.

The order of the Court of Appeals denying the petition for rehearing appears in Appendix B.

The amended judgment of the District Court entering a final judgment pursuant to FRCP 54(b) in favor of Denman Rubber Manufacturing Company and Central National Insurance Group of Omaha and dismissing Verda D. Hall's claim with prejudice appears in Appendix C.

The judgment of the District Court entering a final judgment pursuant to FRCP 54(b) in favor of Denman Rubber Manufacturing Company only and dismissing

the claims of Verda D. Hall with prejudice appears in Appendix D.

The minute entry and order of the District Court ordering that a final judgment be entered appears in Appendix E.

The minute entry and order of the District Court denying Verda D. Hall's motion to reconsider the granting of summary judgment appears in Appendix F.

The minute entry and order of the District Court granting the motion for summary judgment appears in Appendix G.

The transcript of the hearing of the motion for summary judgment appears in Appendix H.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered on May 31, 1989. A petition for rehearing was denied on

June 30, 1989. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. F.R.C.P. Rule 56 (Appendix I).
2. F.R.E. Rule 401 (Appendix J).
3. F.R.E. Rule 402 (Appendix K).

STATEMENT OF THE CASE

On July 22, 1985, Verda D. Hall was injured while attempting to mount a 16 inch tire on a 16 1/2 inch rim. On March 5, 1986, he filed a petition for damages in the Civil District Court for the Parish of Orleans, State of Louisiana, naming as defendants the Coats Company, Inc., manufacturer of the tire changing machine and their insurer. This cause of action was thereafter removed by the Coats

Company to the United States District Court for the Eastern District of Louisiana on grounds of diversity jurisdiction. On December 29, 1986, plaintiff joined Denman Rubber Manufacturing Company and its insurer, Central National Insurance Company of Omaha as additional defendants.

On October 6, 1987, after the second discovery deadline had passed, petitioners, Denman Rubber Manufacturing Company and Central National Insurance Company of Omaha, timely moved for summary judgment on the grounds that Verda D. Hall had failed to come forward with any admissible evidence that the tire manufactured by Denman Rubber was defective at the time it left the control of the manufacturer.

Hall opposed the motion for summary judgment by offering part of the deposition testimony of the Coats

Company's expert, Jim Holladay. Jim Holladay, Coats' expert, testified in his deposition that, assuming the tire had been inflated to only 30 PSI when it blew up and assuming the tire rim remained on the machine after the explosion, a defect **may** have caused the explosion. The Court of Appeals, in its decision of May 31, 1989, found that both of these assumed facts were sufficiently disputed to survive summary judgment under Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). (Appendix A, p. 4a). For the purposes of petitioners' motion, these two assumed facts underlying Mr. Holladay's opinion may be taken as true, as it is only with Mr. Holladay's opinion where respondent's burden of proof founders.[3]

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[3] Respondent Hall and his co-worker, Reginald Reese, testified that Hall had inflated the tire to only 30 PSI. Hall, Reese and their supervisor all testified that the rim remained on the machine after the explosion.

Mr. Holladay, after first assuming these facts to be true, testified in his deposition that, while the accident tire was not in normal use at the time of the accident and while the warning labels on the tire were adequate, there were **three possible scenarios** for the cause of the accident: (1) gross over-inflation by the plaintiff; (2) damage by plaintiff during the mounting process; and (3) a **manufacturing defect** in the tire. (R., pp. 330-333). However, Mr. Holladay never set forth any **factual** basis whatsoever for his **possible** scenario of the alleged manufacturing defect in the tire.

On November 5, 1987, petitioner's motion for summary judgment was granted by the District Court. The District Court found that Mr. Holladay's proferred testimony that "it **may** have been a

defective tire" amounted to nothing more than a "gratuitous observation," "gratuitous and, heretofore at least, unsupported notions of their (Coats) alleged expert," and "a gratuitous and perhaps even irresponsible observation by this so-called expert." (Appendix H, pp. 18a, 18a, 23a and 23a, respectively).

After first retaining the services of a **new expert**, Verda D. Hall moved for a reconsideration of the previously granted motion for summary judgment. This motion to reconsider was thereafter denied by the District Court on March 29, 1988. On August 30, 1988, an amended judgment was rendered in favor of both petitioners, Denman Rubber Manufacturing Company and Central National Insurance Company of Omaha pursuant to Rule 54(b) entering a final judgment dismissing respondent's claims against petitioners with prejudice.

On September 16, 1988, Verda D. Hall filed a notice of appeal in the United States Court of Appeals for the Fifth Circuit. On May 31, 1989, the Court of Appeals reversed the decision of the Trial Court. Petitioners' application for rehearing was denied on June 30, 1989. Petitioners now seek relief from this Honorable Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

In addition to misinterpreting the clear language of Federal Rule of Civil Procedure 56 and totally ignoring Federal Rules of Evidence 401 and 402, the decision below is in conflict with Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986); Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 106 U.S. 1348 (1986) and Anderson v. Liberty Lobby, Inc., 106 S.Ct.

2505 (1986); with the decisions of other federal court of appeal on the same matter, Finn v. Consolidated Rail Corp., 782 F.2d 13 (1st Cir. 1986); Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985); Evers v. General Motors Corp., 770 F.2d 984 (11th Cir. 1985); United States v. Hollister, 746 F.2d 420 (8th Cir. 1984); United States v. Various Slot Machines on Guam, 658 F.2d 697 (9th Cir. 1981); and Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (DCC 1977); and even with other applicable decisions of the United States Court of Appeals for the Fifth Circuit, Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989), Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547 (5th Cir. 1987); Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986); and Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982).

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BY ALLOWING AN EXPERT'S INADMISSIBLE AND FACTUALLY UNSUPPORTED DEPOSITION TESTIMONY OF A POSSIBLE MANUFACTURING DEFECT TO DEFEAT A PROPERLY SUPPORTED MOTION FOR SUMMARY JUDGMENT.

A. CELOTEX, MATSUSHITA AND ANDERSON.

In this Court's recent decision of Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986) this Court found that under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Once a Motion for summary judgment has been properly filed and supported, Rule 56(e) requires that the non-moving party go beyond the pleadings

and by affidavits, depositions, answers to interrogatories or admissions on file to designate specific facts showing that there is a genuine issue for trial. This Court further found that Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

In such a situation, the Court found that there could be no genuine issue as to any material fact because a **complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.** The moving party is entitled to judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element

of its case with respect to which it has the burden of proof. Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986).

This Court properly stated in Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), that the Federal Rules of Civil Procedure have for almost fifty years authorized motions for summary judgment upon proper showing of lack of genuine, triable issues of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. Federal Rules of Civil Procedure 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Additionally, one of the principal purposes of the summary judgment rule is to isolate and

dispose of factually unsupported claims or defenses.

As this Court has previously stated, a party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 106 U.S. 1348 (1986). The same should be true of "possible scenarios."

The Court of Appeals in this matter, as did the Court of Appeals in Celotex Corp. v. Catrett, 756 F.2d 181 (DCC 1985), declined to consider petitioners' argument that the evidence produced by respondent in opposition to their motion for summary judgment would have been inadmissible at trial. As the dissenting judge of the Court of Appeals stated in Celotex Corp. v. Catrett, 756 F.2d 181 (DCC 1985), the majority's decision here also "undermines the traditional authority of trial judges

to grant summary judgment in meritless cases." Id., at 756 F.2d 187.

This Court, in reviewing the summary judgment determination granted in Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986) stated at p. 2512 as follows:

> "Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for a summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is

entitled to a verdict -- 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'"

This Court further noted in Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986) at p. 2510:

"In First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'

"We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint.' Id., at 290, 88 S.Ct., at 1593."

B. PRODUCTS LIABILITY LAW OF LOUISIANA.

In order to be successful in a products liability claim, under Louisiana law, plaintiff has the burden of proving the following:

1. That there was a defect in the product which existed at the time of its manufacture;

2. That the product was in normal use at the time of the incident sued upon;

3. That the product was unreasonably dangerous in that use; and

4. That the plaintiff's injury was caused by the defect in the product.

See, Weber v. Fidelity & Casualty Ins. Co., 250 So.2d 751 (La. 1971), Scott v. White Trucks, 699 F.2d 714 (5th Cir.

1983); Robertson v. Superior PMI, Inc., 791 F.2d 402 (5th Cir. 1986); Bell v. Jet Wheel Blast, 462 So.2d 166 (La. 1985).

C. RESPONDENT, HALL, FAILED TO PRODUCE ANY ADMISSIBLE EVIDENCE OF DEFECT.

The accident in question occurred on July 22, 1985. Petitioners' motion for summary judgment was filed over two years after the date of the accident and in that period of time Hall was unable to come forward with any **admissible** evidence whatsoever to demonstrate that the tire at issue was defective.

Petitioner's original motion for summary judgment (R., p. 367) was supported by the deposition testimony of plaintiff's own expert, Robert T. Bell, by the deposition testimony of the expert of The Coats Company, Jimmy Holladay, as well as by the deposition testimony of the plaintiff himself. Furthermore, the

motion for summary judgment was supported by the warnings placed on the tire at issue specifically stating not to mount a 16 inch tire on a 16½ inch rim. (R., pp. 314-315).

At the time of petitioner's motion for summary judgment, plaintiff had retained the expert services of Robert T. Bell. Mr. Bell testified at his deposition that:

1. He had never examined the accident tire. (R., p. 325).

2. He had no opinion as to whether the accident tire was defective. (R., pp. 326-329).

3. Plaintiff was misusing the tire at the time of the accident. (R., pp. 326-329).

4. The warning labels on the tire were adequate. (R., pp. 326-329).

Therefore, at the time of petitioners' motion for summary judgment,

respondent's own expert, Robert T. Bell, could not testify regarding any condition of the tire which rendered it defective. Respondent Hall also attempted to rely on the expert testimony of Jimmy Holladay of The Coats Company, Inc. Mr. Holladay testified in his deposition that:

1. The accident tire was not in normal use at the time of the accident. (R., pp. 330-333).

2. The warning labels on the tire were adequate. (R., pp. 330-333).

Mr. Holladay further testified in his deposition that he had developed three possible scenarios for the cause of the accident:

1. Gross over-inflation by respondent Hall (R., pp. 330-333);

2. Damage by respondent Hall during the mounting process (R., pp. 330-333); and

3. A manufacturing flaw in the tire (R., pp. 330-333).

However, Mr. Holladay set forth no factual basis for his possible scenario of the manufacturing flaw in the tire.

At the hearing on petitioner's motion for summary judgment, the District Court found that the statement of Mr. Holladay regarding a manufacturing flaw in the tire was nothing more than an unsupported gratuitous observation. (Appendix H, p. 23a).

In addition to the lack of any expert testimony regarding a defect in the tire at issue, petitioner's motion for summary judgment was supported by the testimony of respondent Hall himself indicating he was well aware of the dangers of attempting to mount a 16 inch tire on a 16½ inch rim. (R., pp. 322-324).

In reversing the decision of the Trial Court, the United States Court of

Appeals for the Fifth Circuit found that there was a material issue of fact as to whether the tire at issue was defective based on the testimony of Coats' expert, Jimmy Holladay. Mr. Holladay testified in his deposition that **assuming** (1) the tire had been inflated to only 30 PSI when it blew up, and (2) the tire remained on the machine after the explosion, a defect in the tire **MAY** have caused the explosion. (R., pp. 146, 209-210).

The Court of Appeals found that:

> "Both of these assumed facts were sufficiently disputed to survive summary judgment under Celotex Corp. v. Catrett, 477 U.S. 317 (1986)." (Appendix A, p. 4a).

The Court of Appeals further stated concerning this that:

> "The district court did not reject the contention that either of these underlying facts was in dispute or that each may have been material. Instead, it simply chose to disregard Hall's testimony as purely self-serving. We agree with plaintiff that such treatment

was improper at the summary judgment level." (Appendix A, p. 5a).

The Court of Appeals further chastised the District Court as follows:

> "The summary judgment record revealed that one of Coats's defenses to its own liability would be that the tire was defective. Where its expert testified to this effect, based upon assumed facts which unquestionably were in dispute, it is not for the trial judge to reject such testimony out of hand in excusing a co-defendant from trial. Such credibility determinations and weighing of the evidence are quintessentially the province of the jury and should not be carried out summarily before the development of the full record." (Appendix A, p. 5a).

It should be quite apparent that the District Court was more intimately familiar with the facts of this case than was the Court of Appeal. At no time did petitioners dispute the two assumed facts above. See Transcript of Hearing of the Motion for Summary Judgment (Appendix H, p. 16a). For the purposes of this motion,

these two assumed facts may be taken as true.

However, the District Court did astutely recognize two important matters that the Court of Appeals has ignored:

1. That Mr. Holladay's conclusion was **only** that the tire **may** have been defective (Appendix H, p. 18a); and

2. Mr. Holladay's **observation** that there was a manufacturing defect in the tire was wholly **unsupported** by any factual evidence (Appendix H, pp. 21a, 23a).

Simply put, the Court of Appeals erroneously assumed that the facts of the accident "unquestionably were in dispute" and that respondent Hall and the expert he offered in opposition to the motion for summary judgment had provided specific facts of a manufacturing defect to support the conclusory allegations of such

manufacturing defect when the record clearly shows no such specific supporting facts were ever offered. While there were certainly "underlying facts" as to how the accident happened, i.e. (1) 30 PSI and (2) the tire remained on the machine after the explosion, no real facts probative of a manufacturing defect were ever produced by respondent, e.g. (1) that the tire was improperly vulcanized or (2) that the steel belt was broken before this accident.

The District Court, therefore, made no such credibility determination or weighing of the evidence, as there was no such admissible evidence on this essential element of respondent's case. While the District Court may have failed to specifically articulate its reasons during the hearing, it is obvious that it felt at that time that the opinion of the "so-called expert" was inadmissible ("may have

been defective") and that the "so-called expert's" conclusory allegations of a manufacturing defect were without specific supporting facts ("gratuitous and heretofore at least, unsupported notions of their alleged expert") and had no probative value whatsoever.

The Court of Appeals, in so chastising the District Court, failed to follow its own prior rulings. In Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982), it stated at page 596:

> "The determination of the admissibility of evidence is within the broad discretion of the trial court and will not be disturbed absent an abuse of discretion resulting in substantial prejudice to the rights of a party. Dickerson v. Metropolitan Dade County, 659 F.2d 574, 579 and n. 15 (5th Cir. 1981); Fed.R.Evid. 103(a)."

See also, United States v. Bernhardt, 642 F.2d 251, 253 (8th Cir. 1981) (per curiam); United States v. Johnson, 516 F.2d 209, 214 (8th Cir. 1975), cert.

denied 423 U.S. 859, 996 S.Ct. 112, 46 L.Ed.2d 85 (1975).

It is indisputable that a Rule 56 determination must be made only upon admissible evidence. FRCP 56(e). Material that would be inadmissible at trial cannot be considered on a motion for summary judgment because, if offered at trial, it would not serve to establish a genuine issue of material fact. Finn v. Consolidated Rail Corp., 782 F.2d 13 (1st Cir. 1986) at p. 16; Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985) at p. 956; Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (DCC 1977); 10(A) C. Wright, A. Miller & M. Cane, Federal Practice & Procedure: Civil §2727 at p. 156 (2nd Ed. 1983); and 6 Moore Federal Practice §56.-15[7].

By accepting Mr. Holladay's testimony concerning "possible scenarios" and that "a defect in the tire may have caused the

explosion," the Court of Appeals totally ignores the clear expression of Congress embodied in Federal Rules of Evidence, Rule 401 and 402. The admission of testimony phrased in terms of "possible" and "may" hardly has "any tendency to make the existence of any fact that is of consequence to the determination of the action more **probable** or less **probable** than it would be without the evidence." FRE 401. (emphasis added). Under FRE 402, such "[e]vidence which is not relevant is not admissible."

In the case of United States v. Hollister, 746 F.2d 420 (8th Cir. 1984), the United States Court of Appeals for the Eighth Circuit stated at page 422 as follows:

> "Although the definition of 'relevant evidence' given in Federal Rule of Evidence 401 is broad, it does have limits. Evidence must be probative of a fact of consequence in the matter, and must have a tendency to make the existence of that

> fact more or less probable than it would have been without the evidence. See Fed.R.Evid. 401. Under the Federal Rules of Evidence, the trial judge has broad discretion in determining relevancy and admissibility. United States v. Bernhardt, 642 F.2d 251, 253 (8th Cir. 1981) (per curiam); United States v. Johnson, 516 F.2d 209, 214 (8th Cir. 1975), cert. denied 423 U.S. 859, 996 S.Ct. 112, 46 L.Ed.2d 85 (1975)."

See also, Young v. Illinois Central Gulf Railroad Co., 618 F.2d 332, 337 (5th Cir. 1980); Dickerson v. Metropolitan Dade County, 659 F.2d 574, 579 and n. 15 (5th Cir. 1981).

The error of the Court of appeals is further compounded by its failure to require that respondent's "adopted" expert ground his opinion of "possible scenarios" on some solid factual basis. In its affirmation of a summary judgment granted to a manufacturer in a product liability action not unsimilar to the present action before the Court, the Court of Appeals for

the Eleventh Circuit in Evers v. General Motors Corp., 770 F.2d 984 (11th Cir. 1985) stated at p. 986:

> "This court has consistently held that conclusory allegations without specific supporting facts have no probative value. Gordon v. Terry, 684 F.2d 736, 744 (11th Cir. 1982), cert. denied 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983); Broadway v. City of Montgomery, 530 F.2d 657, 660 (5th Cir. 1976)."

The Evers court went on to state also at p. 986:

> "We agree with our sister circuits and hold that a party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific facts from the record to support its conclusory allegations."

See also, Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (DCC 1977) at p. 672, and United States v. Various Slot Machines on Guam, 658 F.2d 697 (9th Cir. 1981) at pp. 700-701.

To paraphrase part of the Ninth Circuit's opinion in the above case, where in the depositions submitted by respondent does he present specific facts showing that there is a genuine issue for trial? No specific factual testimony was ever adduced from Mr. Holladay or any other expert of any factual evidence that was **probative** of a manufacturing defect in the tire.

Mr. Holladay's testimony, offered in opposition to the summary judgment motion, does no more than to suggest that a manufacturing defect was **"theoretically possible"** under his assumed facts. However, Federal Rules of Evidence Rules 401 and 402 mandate that respondent's burden of proof is **"probability"**. Respondent must do more than simply show that there is some metaphysical doubt on the issue of whether there was a manufacturing defect in the tire.

Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986).

In the present case, respondent has exhibited a complete failure of proof concerning the most essential element of his case. Nowhere has he exhibited any proof that a manufacturing defect in the tire, more probably than not, caused the tire to explode. As such, under Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), this complete failure of proof necessarily renders all other facts immaterial.

It is indisputable that a jury hearing this matter could not return a verdict for the plaintiff on the basis that "a manufacturing defect in the tire may have caused it to explode." Thus, under Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986), since respondent's evidence cannot be said to be significantly probative on this one most essential element of his case upon which

he bears the burden of proof, summary judgment must be granted.

While there have been other instances where courts of appeal have sanctioned expert testimony phrased in terms of possible causes (Fernandez v. Chios Shipping Co., Ltd., 542 F.2d 145 (2nd Cir. 1976) at p. 154), this case presents this Court with the opportunity to expand on its prior opinions in Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986) and Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986), so as to definitively articulate the standards for the admissibility of evidence in Rule 56 determinations which has not been addressed by this Court. The decision of the panel of the Court of Appeals for the Fifth Circuit in this case is in substantial conflict with both the decisions of its sister courts of appeal

and other decisions within the Fifth Circuit. It disregards the clear dictates of the Federal Rules of Evidence. Further, the decision of the Court of Appeals serves to undermine this Court's decisions in Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 106 S.Ct. 2548 (1986), and Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986), which sought to provide clear directives to the lower courts and litigants regarding summary judgment practice. If a definitive pronouncement is not given by this Court concerning the admissibility of evidence in Rule 56 determinations, it will only serve to further undermine this Court's prior pronouncements in 1986 on summary judgment practice.

II. **WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BY NOT HOLDING THAT PLAINTIFF HAD FAILED TO COME FORWARD WITH SUFFICIENT PROOF OF AN ESSENTIAL ELEMENT OF HIS CASE UNDER STATE LAW, I.E., THAT THE TIRE AT ISSUE WAS IN NORMAL USE AT THE TIME OF THE ACCIDENT.**

The decision of the Court of Appeals for the Fifth Circuit is in material conflict with this Court's pronouncement in Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986) and FRCP 56(c).

As previously stated in Section I, one of the elements upon which a plaintiff has the burden of proof in a product liability action in Louisiana is that the product must be in **normal** use at the time of the accident sued upon. Weber v. Fidelity & Casualty Ins. Co., 250 So.2d 751 (La. 1971), Scott v. White Trucks, 699 F.2d 714 (5th Cir. 1983); Robertson v. Superior PMI, Inc., 791 F.2d 402 (5th Cir.

1986); Bell v. Jet Wheel Blast, 462 So.2d 166 (La. 1985).

In Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), this Court found that Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and on which that party will bear the burden of proof at trial. In such a situation, the Court must find that there can be no genuine issue as to any material fact because a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of his case with

respect to which he has the burden of proof.

Although petitioners strongly contend that respondent Hall did not come forward with any admissible evidence whatsoever of a defect in the tire at issue, even assuming for the sake of argument that respondent Hall did come forward with sufficient evidence of a defect to defeat petitioners' motion for summary judgment on that issue, respondent Hall has further shown a complete and total failure to prove that the product was in normal use at the time of the accident sued upon.

At the time of petitioners' original motion for summary judgment, respondent Hall had retained the expert services of Mr. Robert T. Bell. Mr. Bell testified at his deposition that:

1. He had never examined the accident tire (R. p. 325);

2. He had no opinion as to whether the accident tire was defective (R., pp. 326-329);

3. Respondent Hall was misusing the tire at the time of the accident (R., pp. 326-329); and

4. The warning labels on the tire were adequate (R., pp. 326-329).

Additionally, Jimmy Holladay, expert for The Coats Company, whose testimony respondent Hall adopted, testified that:

1. The tire was not in normal use at the time of the accident (R., pp. 330-333);

2. The warning labels on the tire were adequate (R., pp. 330-333).

Under Louisiana law, as first pronounced in Weber v. Fidelity & Casualty Ins. Co., 250 So.2d 751 (La. 1971), at p. 755, the definition of a defect is a condition which causes a product to be "unreasonably dangerous to normal use,"

Mr. Bell's lack of opinion as to whether the accident tire was defective necessarily means he has no opinion as to whether the tire was in normal use. Thus, the only expert testimony presented at the hearing on the motion for summary judgment on the issue of whether the tire was in normal use, that of Jimmy Holladay, unequivocally found that the accident tire was not in normal use at the time of the accident. Respondent Hall presented no evidence whatsoever to the contrary. Thus, even if there was sufficient evidence to satisfy the first essential element of plaintiff's claim, i.e., that the product was defective, the District Court's summary judgment should have been affirmed by the Court of Appeals on the basis that under Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), respondent Hall failed to prove another essential element

of his claim, that the tire was in normal use at the time of the accident.

The panel of the Court of Appeals for the Fifth Circuit failed not only to follow the pronouncement of this Court in Celotex, but also failed to follow its own prior decisions in this regard. Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989) at pp. 426-427; Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547 (5th Cir. 1987) at p. 549; and Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986) at p. 1196.

As the Court of Appeals for the Fifth Circuit itself stated in Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547 (5th Cir. 1987), at p. 549:

> ". . . [A] party seeking summary judgment may rely upon the complete absence of proof of an essential element of the other party's cause. Fontenot v. Upjohn Co., 780 F.2d 1190, 1196 (5th Cir. 1986). '[T]he movant may discharge his burden by demonstrating that if the case went to trial there would be no

> competent evidence to support a judgment for his opponent.' Id., 'quoting 10(a), C. Miller, A. Wright, M. Cane, Federal Practice & Procedure: Civil 2d §2727 at 130 (1983) (hereinafter Wright))."

Here, the very deposition testimony which respondent Hall adopted to oppose your petitioners' motion for summary judgment proves petitioners' entitlement to the relief sought. Mr. Holladay states clearly that the tire was not in normal use. This lack of an essential element of respondent Hall's case, upon which he bore the burden of proof, was also ignored by the Court of Appeals in its rush to judgment. By doing so, the Court of Appeals also ignores this Court's explicit pronouncement in Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986).

CONCLUSION

The Petition for a Writ of Certiorari should, therefore, be granted. Indeed, so clear is the error of the Court of Appeals, it is submitted that the appropriate relief would be the summary reversal of the decision.

Respectfully submitted,

BERNARD, CASSISA,
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Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

NO. 88-3591
Summary Calendar

VERDA D. HALL,
Plaintiff-Appellant

versus

THE COATS COMPANY, INC., ET AL.,
Defendants,
DENMAN RUBBER MANUFACTURING COMPANY AND CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana
(CA-86-1729-M)

(May 31, 1989)

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

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* Local Rule 47.5.1 provide: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Plaintiff Verda D. Hall was seriously injured while changing a tire in the course of his employment. Hall subsequently brought a products liability suit in Louisiana state court against the Coats Company ("Coats") (the manufacturer of the tire-changing machine), the owners of the tire rim, and the unknown manufacturer of the rim. Coats removed the case to federal court based upon diversity. Denman Rubber Corporation (sic) ("Denman"), the manufacturer of the exploded tire, and Central National Insurance Company of Omaha ("Central"), its liability insurer, were then brought into the suit as co-defendants, based upon testimony by Coats's expert that a defect in the tire may have caused the explosion. Coats (sic) filed a motion for summary judgment, arguing that there was insufficient evidence of a possible

defect. The trial court granted this motion. Plaintiff's subsequent motions to reconsider and to recall the summary judgment and to remand the case to state court were denied. He now appeals from the entry of final judgment for Denman and Central.

On appeal, plaintiff contends that summary judgment was inappropriate because there was a disputed question of material fact that the tire may have been defective, and that the trial court erred in not recalling the summary judgment after he came forward with new expert testimony on the question of a possible defect. We reverse on the ground that the original summary record reveals a material question of fact that the tire may have been defective.[1]

---

[1] Because we conclude that plaintiff met his burden in defending against the summary judgment, we need not, and do not, address the question of whether the trial court abused its discretion in not reopening the record in light of the new expert testimony.

In order to recover against Denman and Central, plaintiff has to establish, inter alia, that the tire was defective. Weber v. Fidelity & Cas. Ins. Co., 250 So.2d 751, 755-56 (La. 1971). Jim Holladay, Coats's expert, testified in his deposition that, assuming the tire rim remained on the machine after the explosion and the tire had been inflated to only thirty PSI when it blew up, a defect in the tire may have caused the explosion. Both of these assumed facts were sufficiently disputed to survive summary judgment under Celotex Corp. v. Catrett, 477 U.S. 317 (1986).[2]

---

[2]Plaintiff and Reginald Reese testified that plaintiff had inflated the tire to only thirty PSI, while plaintiff, Reese, and Larry Frost all testified that the rim remained on the machine after the explosion.

The district court did not reject the contention that either of these underlying facts was in dispute or that each may have been material. Instead, it simply chose to disregard Hall's testimony as purely self-serving. We agree with plaintiff that such treatment was improper at the summary judgment level.

The summary judgment record revealed that one of Coats's defenses to its own liability would be that the tire was defective. Where its expert testified to this effect, based upon assumed facts which unquestionably were in dispute, it is not for the trial judge to reject such testimony out of hand in excusing a co-defendant from trial. Such credibility determinations and weighing of the evidence are quintessentially the province of the jury and should not be carried out summarily before the development of the full record. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 249 (1986); Honore v. Douglas, 833 F.2d 565, 567 (5th Cir. 1987).

Accordingly, the summary judgment for the defendants is VACATED, and the matter is REMANDED for further proceedings consistent herewith. In vacating, we of course express no view as to the ultimate merit and disposition of plaintiff's claim.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-3591

VERDA D. HALL,

Plaintiff-Appellant,

versus

THE COATS COMPANY, INC., ET AL.,
Defendants,
DENMAN RUBBER MANUFACTURING COMPANY, and CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING
(June 30, 1989)

Before POLITZ, KING and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/J. SMITH
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VERDA D. HALL	*	CIVIL ACTION
	*	
VERSUS	*	NO. 86-1729
	*	
THE COATS COMPANY, ET AL	*	SECTION M
	*	
	*	MAG. 4

* * * * * * * * * * * *

JUDGMENT

WHEREAS, upon consideration of defendants' motion and the legal memoranda filed in connection with the Motion for Summary Judgment against plaintiff, Verda D. Hall, and the Minute Entry opinion rendered by the Court on November 5, 1988;

WHEREAS, all claims of the plaintiff asserted against defendants, Denman Rubber Manufacturing Company and Central National Insurance Company of Omaha, were determined in that Minute Entry;

WHEREAS, there is no just reason to delay entering a final judgment pursuant to Federal Rule of Civil Procedure 54(b)

in favor of defendants, Denman Rubber Manufacturing Company and Central National Insurance Company of Omaha;

IT IS ORDERED, ADJUDGED, AND DECREED that pursuant to Federal Rule of Civil Procedure 54(b) all claims asserted by Verda D. Hall against Denman Rubber Manufacturing Company and Central National Insurance Company of Omaha in this matter are dismissed, with prejudice.

New Orleans, Louisiana, this 30th day of August, 1988.

/s/ PETER BEER
UNITED STATES
DISTRICT JUDGE

DATE OF ENTRY
AUGUST 31, 1988

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VERDA D. HALL	CIVIL ACTION
VERSUS	NO. 86-1729
THE COATS COMPANY, ET AL	SECTION: M

JUDGMENT

WHEREAS, upon consideration of defendant's motion and the legal memoranda filed in connection with the Motion for Summary Judgment against plaintiff, Verda D. Hall, and the Minute Entry opinion rendered by the Court on November 5, 1988;

WHEREAS, all claims of the plaintiff asserted against defendant, the Denman Rubber Manufacturing Company, were determined in that Minute Entry;

WHEREAS, there is no just reason to delay entering a final judgment pursuant to Federal Rule of Civil Procedure 54(b) in favor of defendant, Denman Rubber Manufacturing Company;

IT IS ORDERED, ADJUDGED, AND DECREED that pursuant to Federal Rule of Civil Procedure 54(b) all claims asserted by Verda D. Hall against Denman Rubber Manufacturing Company in this matter are dismissed with prejudice.

New Orleans, Louisiana, this 11th day of August, 1988.

/s/ PETER BEER
UNITED STATES
DISTRICT JUDGE

DATE OF ENTRY
AUGUST 12, 1988

APPENDIX E

MINUTE ENTRY
BEER, J.
11 AUGUST 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VERDA D. HALL	CIVIL ACTION
VERSUS	NO. 86-1729
THE COATS COMPANY, ET AL	SECTION: M

This matter came before the Court on the joint motion of plaintiff, Verda D. Hall, and defendant, The Coats Company, for leave of court to file amended pleadings, to remand this matter to the state court, and to recall the order granting summary judgment in favor of Denman Rubber Manufacturing Company.

Denman Rubber Manufacturing Company objects to the recall of the order granting its motion for summary judgment entered by this Court on November 5, 1987. Upon consideration of the legal memoranda, the oral argument of counsel, the record

and the applicable law, the motion to recall the summary judgment entered in favor of Denman Rubber Manufacturing Company is DENIED.

All claims asserted by Verda D. Hall against Denman Rubber Manufacturing Company have been fully and completely adjudicated and there is no just reason to delay entering a final judgment in favor of Denman Rubber Manufacturing Company.

The motion to amend the pleadings and to remand this action to the state court is DENIED WITHOUT PREJUDICE.

/s/ PETER BEER

DATE OF ENTRY
AUGUST 12, 1988

APPENDIX F

MINUTE ENTRY
BEER, J.
25 MARCH 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VERDA D. HALL	CIVIL ACTION
VERSUS	NO. 86-1729
THE COATS COMPANY, ET AL	SECTION: M

This matter came before the Court on the motion of plaintiff, Verda Hall, to reconsider the summary judgment granted on behalf of Denman Tire Company on November 5, 1987.

Upon consideration of the legal memoranda, the oral argument of counsel, and the applicable law, the plaintiff's motion to reconsider is DENIED.

Accordingly, counsel for Denman Tire Company is directed to prepare a judgment. This judgment, however, is not final for appeal purposes under Rule 54(b) of the Federal Rules of Civil Procedure.

DATE OF ENTRY
MARCH 30, 1988

/s/ PETER BEER

APPENDIX G

MINUTE ENTRY
BEER, J.
5 NOVEMBER 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VERDA D. HALL	CIVIL ACTION
VERSUS	NO. 86-1729
THE COATS COMPANY, ET AL	SECTION: M

This matter comes before the court on the motion for summary judgment by defendant, Denman Rubber Manufacturing Company. After consideration of all the legal memoranda and oral argument of counsel, the motion for summary judgment is GRANTED.

Counsel for defendant is to prepare a judgment.

/s/ PETER BEER

DATE OF ENTRY
NOVEMBER 6, 1987

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VERDA D. HALL	CIVIL ACTION
VERSUS	NO. 86-1729
THE COATS CO., INC., ET AL	SECTION M

TRANSCRIPT OF HEARING OF THE MOTION FOR SUMMARY JUDGMENT OF DENMAN RUBBER MANUFACTURING COMPANY, HEARD BEFORE THE HONORABLE PETER BEER, U.S. DISTRICT JUDGE, ON WEDNESDAY, NOVEMBER 4, 1987.

REPORTED BY: RHONDA J. BALLARD, CSR
OFFICIAL COURT REPORTER

P R O C E E D I N G S

(Wednesday, November 4, 1987)

THE CLERK: 86-1729, Varda D. Hall versus The Coats Company, Inc., et al.

MR. CAPLAN: Good morning, your Honor. Howard Caplan, on behalf of Denman Rubber Manufacturing Company.

We have before you a Motion for Summary Judgment and --

THE COURT: I am familiar with the facts and the contentions et cetera. Go right to the point. I suppose your point is pretty much made in your brief, but anything that you want to highlight, go ahead and do so.

MR. CAPLAN: Well, your Honor, the only thing I would like to highlight as far as the Plaintiff's expert, there was no evidence anything was wrong with our tire, the warnings were fine. He said the tire was being misused when he put it on the machine, and he came forward with no

opinion whatsoever as to whether this tire is defective. The only possible thing is our co-defendant who is Coats Machine, has not filed an opposition.

THE COURT: He made the gratuitous observation it may have been a defective tire.

MR. CAPLAN: There is one thing that I would want to bring to the attention of this Court that is not in the memorandum. The subsequent report that he issued was issued in October of 1986. His deposition was taken in September of 1987. He was asked the following:

"Do you have an opinion whether the tire, the 16 inch tire you identified in your report, would have exploded at thirty pounds per square inch if mounted on a 16 inch rim."

"Do I have an opinion as to whether it could."

"The question was whether it would have exploded at thirty PSI if it would have been mounted on a 16 inch rim."

His answer was: "With what we know with the tire right now, I really have no way of answering the question. I don't think there is enough today to support an answer to that question."

Basically, he has no facts to support his mere allegation that either the beads were broke on the tire or that there was some sort of defect. He has come forward with no facts to support his allegations of defect. I don't think there is any facts from either expert that suggests that this tire was defective. Simply a complete lack of evidence.

In response to Mr. Hardy's opposition, it is my understanding from his argument that it is a question of fact as to whether this tire, when being mounted in the manner it was being mounted

in this accident, whether that makes this tire unreasonably dangerous per se.

I think if you follow his argument to a logical conclusion, Summary Judgment could never be granted, there would always be a question of fact whether any product was unreasonably dangerous per se. I think even under unreasonably dangerous per se, he still has to come forward with some facts which suggest that this product is unusually dangerous per se, such as an apparatus, in the fact that when it is used in its normal course and the manner advised it can still cause injury to people.

There has never been any sort of facts which would suggest that this product is unreasonably dangerous per se. I think that burden is on the Plaintiff to come forward with some facts. I simply think there is no facts in the record or have been put into evidence that suggests

that this tire was defective and I think that the Summary Judgment is appropriate.

MR. HARDY: Ford Hardy, for the Plaintiff. True, my expert does not find the tire defective. The reason why this company was brought in as the Defendant, was because the co-defendant's expert made the comment in a report of September 4, 1986 that if the Plaintiff testified truthfully at his deposition that he did over inflate the tire while mounting it on the machine, then the tire contained the manufacturing defect. Five or six words that are as clear as a bell. If you are not going to believe this expert, you have to disbelieve him on a trial, not on Summary Judgment.

We deposed the man they had the chance to go into it again. On page 56. He says:

"Mr. Hall damages the tire or it had a manufacturing defect.

This man testified that he felt he was a tire expert. If we go to trial, assuming I do not settle this case, the jury is going to sit and hear one expert saying the tire was bad. I want that party to be sitting here so the jury doesn't think, maybe he is right. That tire could have been bad. That machine looks safe to me. My opinion the machine is dangerous as you can get, next to a chain saw.

THE COURT: I am familiar with the machine. I am also familiar with the contention here that doesn't seem to me to be challenged that the guy used a 16 and a half inch rim up for a 16 inch tire.

MR. HARDY: He didn't use it, your Honor. He came into the process when -- the mounting process when it was on the rim. The Plaintiff was not contributory. his boss was. That is something the jury is going to have to think about at trial.

I don't want an empty chair sitting here, the defense expert saying the machine is not dangerous, the tire is bad, all kinds of evidence --

THE COURT: I am not sure I am going to permit any evidence on that. The gratuitous observation by their expert seeking to push the contention of liability off on the tire people can't survive on the gratuitous and heretofore at least, unsupported notions of their alleged expert.

It seems to me that that is pretty far-fetched. I think your pleadings were in order when you drew them up as you did, and I really don't see anything here to seriously support the notion that there is any impropriety on the part of the tire manufacturer except what I perceive to be a gratuitous and perhaps even irresponsible observation by this so-called expert.

MR. HARDY: The bead did break in the tire, that much is confirmed. Given that set of facts, I didn't bring the company in, because my expert felt that the machine is dangerous, still dangerous, will be dangerous, very difficult to put a tire on the rim without a dangerous machine.

Under Halfin (phonetical) he is right. It is difficult, almost to lose a products liability case, if you read Halfin per se and find a dangerous product. It says you win. That is the Supreme Court telling the Fifth Circuit what to do. If you feel that shouldn't in this case, I think you ought to have some sort of ruling by Motion in Liminae to instruct this expert who feels he is qualified and he is qualified, he has been designing these machines for years. He has been an engineer and well qualified. The fact he doesn't agree with my expert,

doesn't make him any less qualified to say this.

THE COURT: This guy hasn't expressed his expertise to that tire at all. He hasn't done any examination of the tire.

MR. HARDY: He did inspect the tire, and found the bead to be broken.

THE COURT: Well, to the extent of the circumstance which everybody knew the bead was broken, after it was examined, after the event took place. Nobody contends that the bead wasn't broken. Everybody agrees that after the fact, the event of putting a 16 inch tire on the 16 and a half inch mounting device, the bead was broken. But so what. That is the extent of his observation, that the bead was broken. He isn't telling us anything that you or an untrained laymen can look at it and see that the bead is broken.

MR. HARDY: Think what you are doing, if I may say this, saying I don't think

these people are liable and Summary Judgment may or may not be the proper remedy. The jury has the right to view this expert, who says the tire was defective. I think, by what you are saying, you may be using a common sense approach, no way the tire can be bad. They haven't put the expert's report into evidence yet, making this decision, basing it on the fact any expert didn't look at the tire, their expert did. Co-defendant's expert found it bad. They are moving for Summary Judgment saying they didn't say it was bad, he did. The proper vehicle would be at the jury trial to argue to the jury.

THE COURT: I am annoyed. It isn't your fault that the guy comes out with this sort of gratuitous musing where he says it is either this or that and then suddenly as a good lawyer you are stuck

with that musing to the point where you say wait a minute, I can't have an empty seat.

MR. HARDY: The man has a right to give his opinion. He qualifies, if he gives his opinion to the jury, they are out. The obvious out is the man shouldn't put the tire, he didn't chose the tire or the rim. He was told to go do it. Let out the tire company now without the jury to have the right to see Mr. Holliday who is the machine's expert, I think puts me at an unfair advantage at trial.

THE COURT: I think you made a good argument in a situation where it really would be tempting for me to grant the motion. I think your argument is tenuous. I think you had to make it in light of what I think is some sort of gratuitous observation by the Supreme Court of Louisiana in terms of going as far as they went in this.

MR. CAPLAN: In response to his argument, it is equally unfair to make my client go to trial and to have to defend a tire where neither expert has come forward with any facts supporting the tire is defective.

THE COURT: Thank you gentlemen. Call the next case.

* * * * * * * * * * *

REPORTER'S CERTIFICATE

I, RHONDA J. BALLARD, CSR, Official Court Reporter for the United States District Court for the Eastern District of Louisiana, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the above-entitled and numbered matter.

/s/ Rhonda J. Ballard
RHONDA J. BALLARD, CSR
OFFICIAL COURT REPORTER

APPENDIX I

Rule 56 of the Federal Rules of Civil Procedure governing summary judgment provides as follows:

> "**Rule 56. Summary Judgment**
>
> "(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment, by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> "(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> "(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

"(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

"(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's

opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay,the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

APPENDIX J

Rule 401 of the Federal Rules of Evidence provides as follows:

> **"Rule 401. Definition of 'Relevant Evidence'**
>
> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

APPENDIX K

Rule 402 of the Federal Rules of Evidence provides as follows:

> **"Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**
>
> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

APPENDIX L

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

DENMAN RUBBER MANUFACTURING COMPANY
AND CENTRAL NATIONAL INSURANCE
COMPANY OF OMAHA,
PETITIONERS

VS

VERDA D. HALL,
RESPONDENT

NOTARIZED STATEMENT
OF MAILING

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared:

ROBERT A. McMAHON, JR.,

who, after first being duly sworn by me, did depose and state that he is counsel of record in the above matter, that he is a member of the Bar of the Supreme Court of

the United States; that the Petition for Writ of Certiorari in the above matter and all attachments was timely deposited with the United States Postal Service, Station A, 701 Metairie Road, Metairie, Louisiana 70005, with first class postage prepaid, properly addressed to Honorable Joseph F. Spaniol, Jr., Clerk of Court, Supreme Court of the United States, Washington, DC 20543, on Wednesday, September 27, 1989, and that to his knowledge the mailing did so take place on September 27, 1989.

Robert A McMahon Jr
ROBERT A. McMAHON, JR.

Sworn to and subscribed
before me this 27th day
of September, 1989.

NOTARY PUBLIC

EUGENE M. McEACHIN, JR.
NOTARY PUBLIC
PARISH OF JEFFERSON - STATE OF LOUISIANA
My Commission is issued for life

APPENDIX M

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

DENMAN RUBBER MANUFACTURING COMPANY
AND CENTRAL NATIONAL INSURANCE
COMPANY OF OMAHA,
PETITIONERS

VS

VERDA D. HALL,
RESPONDENT

PROOF OF SERVICE

I, ROBERT A. McMAHON, JR., counsel of record in the above matter and a member of the Bar of the Supreme Court of the United States, representing Denman Rubber Manufacturing Company and Central National Insurance Company of Omaha in the above matter, do here certify that on Wednesday, September 27, 1989, three (3) copies of the Petition for Writ of Certiorari and

all attachments were deposited with the United States Postal Service, Station A, 701 Metairie Road, Metairie, Louisiana 70005, with first class postage prepaid, properly addressed to Ford T. Hardy, Jr., Esq., 416 Gravier Street, New Orleans, Louisiana 70130, counsel for Verda D. Hall. I further certify that all parties required to be served have been so served.

Robert A. McMahon, Jr.
ROBERT A. McMAHON, JR.